Public Knowledge

October 4, 2011

Julius Genachowski
Chairman
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: WT 11-65, Applications of AT&T Inc. and Deutsche Telekom AG For Consent To Assign or Transfer Control of Licenses and Authorizations

Dear Chairman Genachowski:

The proposed merger between AT&T and T-Mobile has garnered more attention than the typical merger. The actions of both the Commission and the Department of Justice have been followed with close scrutiny by Congress, the press, bloggers, advocates for and against the merger, and the public. With a series of Protective Orders, the Commission has tried to balance the public's right to access information with the legitimate need of AT&T and T-Mobile to keep certain competitively-sensitive information from competitors. Unfortunately, AT&T and T-Mobile have abused the Commission's process, putting far more information than is proper behind a cloak of secrecy. In particular, they have put their economic models (submitted on July 26 and subsequently modified by additional submissions) under seal, keeping from the public the very basis of their public interest claims. Again and again, the parties have claimed confidential and highly confidential protection not just for information that would put them at a competitive disadvantage, but for information that is merely embarrassing or contrary to the publicly-articulated justifications for the proposed merger. These actions undermine the Commission's stated aim to protect "the right of the public to participate in this proceeding in a meaningful way."[1] Key data have been kept out of public conversation, and as a consequence, many commentators are forced to analyze the proposed merger based only on the incomplete and misleading public record.

To begin to rectify this, the Commission should clarify the process for challenging claims of confidentiality. Furthermore, because Applicants have demonstrably abused the process with overbroad claims of confidentiality, the Commission should require on a going forward basis that Applicants include a justification for claims of confidentiality, and not merely an assertion that the material is confidential or highly confidential.

[1] Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Assign or Transfer Control of Licenses and Authorizations, WT Docket 11-65, Protective Order (Apr. 14, 2011) ¶ 1; Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Assign or Transfer Control of Licenses and Authorizations, WT Docket 11-65, Second Protective Order (Revised) (June 22, 2011) ¶ 1.

AT&T inadvertently showed the importance of some of its confidential data when it accidentally disclosed an unredacted version of one of its Commission filings. Publicly, AT&T says that its purchase of T-Mobile is the *only* path to improved 4G wireless coverage for rural America. It claims that it needs to pay $39 billion for T-Mobile's spectrum and infrastructure to make the rural 4G upgrade possible. But its leaked confidential documents show otherwise. The leaked letter revealed that AT&T could expand LTE coverage to 97% of Americans through a $3.8 billion capital investment, but found there was no business case for doing so. According to one analyst, by demonstrating that AT&T can achieve some of the purported benefits of the merger more cheaply by other means, this letter "demolishes" AT&T's case for its merger, and "decimates" its "#1 talking point."[2] While none of this is news to people who have had access to the confidential record, its public disclosure marked a turning point in stories about the merger by exposing AT&T's arguments as self-serving justifications for a merger whose true purpose is to cement AT&T's wireless dominance.

Information of the kind that AT&T accidentally disclosed should never have been secret to begin with. The Commission's policies essentially allow parties to claim protection for trade secrets—information "which, if released to competitors or those with whom the Submitting Party does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations,"[3] and "that is not otherwise available from publicly available sources and that is subject to protection under FOIA and the Commission's implementing rules."[4] But a trade secret must have an independent economic value. It must give its owner an "actual or potential economic advantage over others."[5] A company does not gain trade secret protection over data it simply wishes were not widely known. With regard to data that has leaked, for instance, it is no surprise to AT&T's competitors that it can, if it chooses, upgrade its network to expand 4G coverage more cheaply than it can purchase one of its major competitors. Since this data contradicts its public case for the merger, AT&T has good reason to want to keep this data secret. But this does not give it grounds to claim confidentiality. Embarrassing facts are not trade secrets.

Another example serves to illustrate AT&T's overreliance on confidentiality: it has decided that the economic and engineering models that it has submitted to justify its merger should be off-limits to public inspection. This insulates one of the lynchpins of its entire case from objective, public criticism. Engineers, economists, academics, and other professionals

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[2] Karl Bode, DSL Reports, http://www.dslreports.com/shownews/Leaked-ATT-Letter-Demolishes-Case-For-TMobile-Merger-115652.

[3] Second Protective Order ¶ 1.

[4] Protective Order ¶ 2. The Commission references information that is subject to "protection under FOIA" and cites 5 U.S.C. § 552(b)(4) as authority. Second Protective Order ¶¶ 2, 20. While section 552(b)(4) references "trade secrets and commercial or financial information obtained from a person and privileged or confidential" and is arguably slightly broader than trade secrets alone, the Commission should not read this too loosely—to do so could allow any regulated entity, for instance, to mark as "confidential" any new data produced subject to Commission request. Protected information ought to be commercially sensitive, and potentially useful to competitors. Furthermore, it is highly relevant that FOIA is not a bar on government disclosures of information—exceptions to FOIA are just areas where the government cannot be *forced* to disclose. It does not forbid the government from disclosing anything.

[5] Restatement (3d) of Unfair Competition, § 39.

should be able to scrutinize these models. Even if some of the inputs based on confidential AT&T data (*e.g.,* projections regarding subscriber usage of its network) are omitted from them, the Excel workbook structures themselves (including the formulas and algorithms used to make the model's marginal cost and simulation calculations) should be open to outside analysis. If these models are indeed valuable tools for the analysis of mergers in the abstract, independent analysts should be able to check their utility without needing access to any of AT&T's confidential data. They should be able to simply plug in figures to see how the models operate, and critique them on that basis. If AT&T is not able to produce redacted versions of the models, however, this indicates that they are not objective models in the first place but rather tools directed to produce a predetermined result given a particular set of data. There is no way of knowing which of these situations is the case unless AT&T discloses the models to disinterested analysis.

Public Knowledge has directly run into problems in its advocacy due to AT&T's broad claims of confidentiality. As a public advocacy organization, PK's job is to communicate its views to politicians, government policy-makers, the press, and the public. But there is no way to tell the complete story as long as large parts of the case remain confidential. For example, a recent filing by PK had to censor a paragraph of data that, were it public, might change the public debate on the merger.[6] Even though the redacted data would not be of use to a competitor formulating a business plan to compete with AT&T, the FCC's current procedures essentially allow a party to claim *any* data as confidential.

For good or for ill, political and public opinion can affect the outcome of high-profile proceedings like this proposed merger. AT&T knows this full well and is able to selectively disclose information that appears to support its argument, even as it submits contradictory, secret information to the FCC. Thus far, AT&T's opponents have been able to make their public case persuasively while scrupulously respecting AT&T's self-chosen confidentiality barriers. But as the debate over this proposed merger intensifies, its opponents should not be forced to argue at a disadvantage in the court of public opinion. Additionally, the Commission and the public interest would be served if outside, disinterested analysts, most of whom are unlikely to ever sign the protective orders, were able to offer independent critique of AT&T's economic and engineering models. Given its overuse of confidentiality in this proceeding, going forward, AT&T ought to bear the burden of demonstrating that each piece of confidential or highly confidential data fits within the scope of a protective order—it should not be able to simply declare that it does.[7] The undersigned therefore ask the Commission to (1) immediately require the public release of AT&T's economic and engineering models, (2) require that AT&T and T-Mobile provide specific justification for each piece of data they believe can be kept under the protection of the Second Protective Order (or risk having that Order withdrawn), and (3) provide a general justification for all the data they believe can be kept under the Protective Order. Furthermore, for the remainder of the proceeding, the Commission should establish a specific procedure whereby parties can challenge the confidentiality of data, including the showings a challenging party must

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[6] *See* Letter from Harold Feld, Legal Director, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, Sept. 19, 2011, *available at* http://www.publicknowledge.org/files/docs/jobs_letter_REDACTED.pdf.

[7] For example, in the leaked letter, AT&T merely states that it is submitting its letter "in accordance" with the protective orders, without offering any specific reasons why, in its belief, information so basic to its case should be hidden from the public.

make, a procedure for a submitting party to respond to the challenge, and a timeline for Commission action in response to the challenge. Finally, to prevent the recurrence of this kind of problem, future protective orders should contain specific challenge procedures when issued.

The Commission has stated in the past that "[t]he public interest in disclosure derives from the interest of parties to a proceeding in receiving adequate notice of potential bases for the agency decision, and an opportunity to comment on those grounds."[8] As long as AT&T's key arguments and data are kept out of the public eye, this vital public interest cannot be served.

Respectfully submitted,

/s Harold Feld
Legal Director
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[8] Petition of Public Utilities Commission, State of Hawaii, *Order*, 10 FCC Rcd 2881 ¶ 12 (1995).